89-302

(1)

CASE NO. _____
IN THE UNITED STATES SUPREME COURT
OCTOBER TERM 1989

Linda A. Hampton and Rose O. Howard,
Petitioners

vs.

Tennessee Board of Law Examiners, jointly and severally, Katherine Darden, Wheeler Rosenbalm, Charles Burson, Valerius Sanford, Lewis Hagood, Joseph Tipton, Michael Whitaker, Rodney V. Ahles, Scott McGinness, Prince Chambliss, Ellen Vergos, other unknown examiners, Memphis State University's Cecil C. Humphreys School of Law, Thomas Carpenter, Claude Kaufman, Francis Sullivan, Daniel Wanat, Robert Banks, Nancy Barron,
Respondants

ON PETITION FOR WRIT OF CERTIORARI
FROM THE COURT OF APPEALS OF
TENNESSEE, WESTERN DIVISION

Linda A. Hampton, Pro Se
72 Lydgate Ave.
Memphis, TN 38109
901-785-8596

Rose O. Howard, Pro Se
2093 Jamie Drive
Memphis, TN 38116
901-396-4905

1:30 PM

ISSUE PRESENTED FOR REVIEW

Whether a state court can grant absolute immunity to state defendants under a valid claim of deprivation of plaintiffs' rights under 42 U.S.C. Sections 1983 and 1985 absent a finding as to whether the defendants' actions did in fact violate the state rule governing their actions.

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Copies of the above orders, opinions and judgments are attached in the appendix of this petition for writ of certiorari.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

On February 27, 1989 the Supreme Court Of Tennessee denied petitioners' petition for writ of certiorari which was sought to review the decision of the Tennessee Court of Appeals which affirmed the trial court's judgment granting absolute immunity to respondents accused of depriving petitioners of their federally and constitutionally protected rights under color of state law.

The petitioners in this case claim violation of their rights under 42 U.S.C. Sections 1983 and 1985, Tennessee Supreme Court Rule 7 and the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

Plaintiffs were failed by the respondents on the state essay portion of the July 1985 Tennessee bar examination after petitioners received passing scores on the multistate portion of the examination of 153 and 145. A score of 130 is required on the multistate portion of the examination.

Petitioners subsequently sought to ascertain standards utilized in determining passing and failing answers on the essay portion of the exam by formally petitioning the Board for any standards or other criteria used in making such determinations. In this petition and brief petitioners raised the claims of violations to their federal and constitutional rights.

The Board denied petitioners petition. However, through informal communications, petitioners were told that there were in fact no standards used in determining the passing and failing of the essay examination. Through these same communications petitioners were told that the examination was of a competitive nature wherein aplicants competed for passing slots. This competitive nature amounts to a fulfillment of quotas. Petitioners were also led to believe that they would pass upon a subsequent retaking of the examination in a letter forwarded to them by the president of the Tennessee Board of Law Examiners.

Petitioners petitioned the Tennessee Supreme Court for writ of certiorari in order to seek review of

the Board's actions. This petition was pending at the time petitioners took the February 1986 bar examination.

During the retaking of the examination, petitioners believe and so alleged that respondents proceeded to intentionally discriminate and retaliate against petitioners by willfully and maliciously taking both petitioners' papers in hand, thereby determining and committing to memory petitioners' examination identification numbers in order to insure a second failing of these petitioners. Petitioners were indeed "failed" a second time.

Petitioners believe and so alleged that the bar examinations were not the true basis for their denial of certification for a license to practice

law but, that such examinations were the means by which respondents denied petitioners such certification.

Petitioners believe and so alleged that the determinations of whether petitioners would be certified were made prior to the examination. Petitioners also believe and alleged that the prior determinations were carried out in fact since the examination lacked anonymity before, during and after the actual examination in violation of Tennessee Supreme Court Rule 7. Before examination the examiners, who graded the state essay answers, assigned numbers to individuals in the check-in line knowing the individuals' names and the numbers assigned to them. During the examination examiners paced throughout

the examination room looking at examination papers recognizing and remembering individuals and their examination identification numbers. The examiners actually took examinations from some applicants such as petitioners where there was a strong desire to insure failure. After the examination, examiners retrieved names and numbers from the American College Testing Service by supplying names, birth dates and social security numbers obtained from the bar exam application itself. The examiners also had the final opportunity to carry out the predeterminations at the time the submitted scores were actually tallied and matched with the individuals.

STATE COURT PROCEEDINGS

In October 1985 petitioners petitioned the Tennessee Board of Law Examiners claiming violation of their constitutional rights under U.S.C. Sections 1983 and 1985. The order subsequently issued by the Board claimed no jurisdiction to hear petitioners' claims. The petitioners then petitioned the Tennessee Supreme Court for writ of certiorari. The Tennessee Supreme Court denied petitioners' petition. At that time the Tennessee Supreme disallowed claims under the federal civil rights statutes to be brought in state courts. Petitioners then filed their federal claims in federal court. After being dismissed in federal court for lack of

jurisdiction, petitioners appealed to the Federal Court of Appeals for the Sixth Circuit. After the sixth circuit affirmed the lower district court, petitioners filed in the Tennessee Circuit Court which now had jurisdiction over federal claims since the Tennessee Supreme Court had reversed its seventeen (17) year precedent disallowing the filing of federal civil rights claims in the state courts two weeks after petitioners had filed their suit in the federal district court.

After petitioners filed in circuit court, the trial court judge issued a stay of proceedings, recused himself, and appointed a special judge designate who lived in another city. The trial court judge by designate issued two

opinions in which he found the state defendants to be absolutely immune solely because of their status as state agents. The judge issued a memorandum opinion initially which was not served upon the petitioners until petitioners inquired to the judge by letter. The opinion was received by the petitioners after the expiration of the time to appeal. After petitioners moved the court to grant them leave to appeal, the judge reiterated his original opinion in his judgment. In neither of the judge's opinions did he attempt to make any factual findings as to whether the respondent's action were within the scope of their authority.

Petitioners then appealed to the Tennessee State Court of Appeals. That court issued its opinion in which it

found the trial court judge's decision to be correct in result but erroneous in reasoning. The appellate court, however, did not offer any other reasons for the result other than the fact that as state defendants, the individuals being sued possessed absolute immunity from liability. Again, no discussion was had as to the respondents' conformity or nonconformity to the Tennessee Supreme Court Rules which governs their actions.

ARGUMENT

This case, Hampton v. Tennessee Board of Law Examiners, is not a case where there has been a trial or hearing in the lower state courts whereby the rights and liabilities of the parties have been adjudicated. The three volume record in this case contains over 300 pages including 60 pages of factual exhibits in support of petitioners' claims and in opposition to summary judgment for respondants. Never did any court opinion refer to this evidence in granting summary judgment for the state respondants. In fact, no lower court has made any type of factual finding regarding the actions of the respondants in this case in spite of the overwhelming amount of

factual evidence submitted by these petitioners regarding the alleged wrongful acts of the respondents. Moreover, nowhere have the state courts found that petitioners have no claim under the Federal Civil Rights Statutes U.S.C. Sections 1983 and 1985. If a plaintiff has a valid claim--not a frivolous or nonmeritorious one--there should be a legal forum (state or federal) in which to have that claim adjudicated. Here, the federal courts abstained because the state courts had decided to finally accept the concurrent jurisdiction. The basis for dismissal given in the state court opinions has been absolute judicial immunity for all respondents absent any factual findings merely because the respondents happen to work for the state.

These individually named respondents who are members and assistants of the Tennessee Board of Law Examiners are given absolute judicial immunity even though the respondents admittedly committed serious and blatant violations of the state rule governing their actions. This is not a situation where the state rules were merely misapplied with regard to these petitioners. Admittedly, the career goals of these petitioners were unjustly destroyed; however, the policies and procedures instituted by the Board constituted serious violations of the Tennessee Supreme Court Rule 7. These violations affect every state citizen directly or indirectly. Nevertheless, the state courts in Tennessee have now held state

defendants immune from liability for any harm caused. The state courts take this position in spite of the fact that the federal government has provided a remedy for this type of petitioner.

Clearly, the immunity doctrines were intended to protect persons who in good faith - carry out their duties according to applicable rules and laws. Certainly, the doctrines were not intended to allow people who work for the state to circumvent state and federal laws enacted to protect the citizens. Furthermore, Congress provided no blanket immunity when it enacted U.S.C. Sections 1983 and 1985.

The courts have made no attempt to explain the rationale for the grant of blanket immunity to the respondents in

this case. The appellate court opinion laboriously lays out the authorized duties of the Tennessee Board of Law Examiners. However, it never addresses the issue of whether the Board members carried out those duties. The opinion goes on to speak of the power of the Tennessee Supreme Court to create the Board and the power of the court to create Rule 7 to govern the Board's actions. Again, the court never addressed the issue as to whether the respondent Board members acted within the rules granting them authority and guidance from the Tennessee State Supreme Court.

The appellate opinion also cites a Kentucky case, Sparks v. Character & Fitness Committe, 818 F.2d 541 (6th Cir. 1987), and laboriously lays out

the facts of that case. However, the court made no attempt to reconcile the facts in that case with those of the instant case. The court simply stated that "the position of the parties in the Sparks case are not unlike the parties in the case at bar." This, of course, is not true.

Even a cursory look at the Sparks case and the record in the instant case would show that finding of the court to be merely conclusory in nature and unsupported by the facts which are quite easily distinsquished in the two cases. The plaintiff in the Sparks case basically sued the supreme court justice and the committee on character and fitness. The nature of the decision of the committee was discretionary and called for a judgment

by committee members. The instant suit in no way names any judge nor any other who had any decision to make that was absolutely discretionary in nature. The Board respondents here did not have unbridled discretion to deal with bar exam applicants according to their individual prejudices and biases. These members were to be guided by Tennessee Supreme Court Rule 7. Moreover, the court specifically stated in Rule 7 that the Board has no power to modify or change the Rule.

Petitioners alleged serious violations of their rights protected by Rule 7 as well as the Constitution of the United States by the respondents named in this case. Petitioners alleged that the Tennessee Board of Law Examiners and its members violated the

many specific sections of the Rule as outlined below.

ARTICLE XII; ORGANIZATION AND POWERS OF THE BOARD

12.02. Officers and Allocation of Responsibilities

The officers of the Board shall consist of a President, a Vice-President and a Secretary-Treasurer. The Board may, however, allocate responsibilities not requiring formal action, as it deems appropriate, on an informal basis.

Petitioners maintain that the individual members violated section 12.02 of Rule 7. Petitioners were

issued an order which is indeed the ultimate in formal action by the Board. The "order" was not signed by any member of the court appointed Board. The administrator signed under the word "attest".

12.03. Official Seal

The Board shall use a seal of office containing the following words: "STATE BOARD OF LAW EXAMINERS."

In this the so-called order was not issued under the requisite official seal of office, nor was it issued on agency letterhead.

12.04 Formal Actions: Quorum

(a)Denial of an application to take the examination, or denial of a license, or the adoption of Board

policies and rules shall be taken only on formal action by a quorum of the Board, expressed in an order.

(b)Two members of the Board shall constitute a quorum.

(c)Preliminary approval to take the examination may be given and any other informal action may be taken by any member of the Board.

The order is formal action which takes two members for a quorum. In this case no Board member signed the "order". Therefore, no requisite quorum expressed a Board decision in an official formal order.

12.05 Rules and Statements of Policy

(a)The Board shall have the power to adopt such rules and such statements

of policy as it may deem necessary or expedient, not inconsistent with the rules of this court.

(b)All such rules and statements of policy shall be kept in an official minute book maintained by the Administrator. Copies of such rules and statements of policy shall be filed with the Court on their adoption. The minute book shall be open to public inspection and the Board shall take reasonably appropriate steps to assure that applicants are given the opportunity to become familiar with the rules and policies of the Board, as well as this Rule.

The Board adopted policies which were inconsistent in form, as well as in the spirit and purpose of Tennessee Supreme Court Rule 7. Specifically, the Board allowed its members to act as examination proctors, essay graders and hearing tribunal as well, thus creating a definite conflict of interest. The Board allowed essay examiners to "pass" and "fail" essay answers with absolutely no objective standards of minimum competency fairly applied to all. The Board allowed its members to match up identification numbers of individual examinees with the examinees' names prior to the grading of examination papers. The Board allowed its members to treat black potential examinees differently from white potential examinees by telling

blacks separate and different information from whites.

The Board also allowed its members to tell examinees prior to examination that they may talk to examiners about their "failing" papers and then upon "failing" to tell examinees that no communication with examiners was allowed. The Board allowed its members to adhere to policies allowing no due process, i.e. no appeal procedures, no review of papers and no means of ascertaining why a particular answer was classified as failing. The members were allowed to dispose of formal petitions informally. The administrator. who is not appointed by the court, was allowed to arbitrarily grant and cancel hearings and sign purportedly official orders. A high

passage rate of whites was insured while blacks were required to compete for a limited number of passing slots.

12.09 Assistants to the Board

The Board may appoint attorneys licensed to practice law in this State and in good standing, subject to the approval of the Court, to assist in the preparation and grading of examination questions, and to perform such other duties in the enforcement of this Rule as the Board may from time to time direct.

The attorneys appointed by the Board in this case did not perform their duties in the enforcement of the Tennessee Supreme Court Rule 7. In

fact, these respondents admittedly violated the very rule which governs the Board as set out above.

ARTICLE IV; THE EXAMINATION

4.07 Anonymity in Grading

The Board shall continue to maintain procedures which assure that the identity of each applicant in the grading process is not known to any person having responsibility for grading or determining whether the applicant passes or fails until the grades of all applicants have been finally determined.

In this case, the three Board members who constructed and graded three of the essay questions, along

with other essay graders, also acted as examination proctors, assigning numbers and seats, checking identification, pacing the room, peering over the shoulders of examinees with plain view of examination numbers and faces.

After being "failed" on the February 1986 bar examination, petitioners filed with the Tennessee Supreme Court an addendum to their original petition for writ of certiorari which established the nexus between the July 1985 bar exam and the February 1986 bar exam. In this addendum petitioners informed the court that when petitioners took the February 1986 bar exam, respondents Burson and Whitaker took petitioners' essay answers in their hands, thus separating petitioners answers from those of other

examinees who were allowed to put their papers in designated boxes, thereby, insuring a second "failure" of these petitioners more blatant than the first. respondents admittedly knew the identity of both petitioners prior to any grading process.

Petitioners maintain that this spur of the moment amending of policies destroyed all pretense of anonymity, at least as to these particular petitioners, by the respondents refusing to allow them to place their answers in boxes as the other examinees were allowed to do. Therefore, said respondents knew the petitioners' identity and were very much aware of the pending legal action taken by petitioners against them and other respondents. This knowledge created a strong will to ascertain as quickly

as possible exactly which papers belonged to petitioners. Said respondents admit to taking petitioners' answers in hand, thereby violating the pertinent section of the Rule insuring anonymity, the greatest procedural safeguard for fairness in the grading process.

Respondent Burson also admitted to changing the policy for the February 1986 bar exam at the Memphis site, thus violating section 12.04 (a) which requires a quorum of at least two Board members in adoption of policy. Respondent Val Sanford went on to admit that all graders did in fact know the identity of examinees throughout the grading process. His admission was warranted in light of the fact that examiners Burson and Whitaker had

already admitted in sworn affidavits before the Tennessee Supreme Court and Circuit Court that they had in fact had the opportunity to match the plaintiffs' identification numbers with their faces and answers prior to the grading process.

ARTICLE XIII; FORMAL PROCEEDINGS BEFORE THE BOARD

13.02 Petitions to Board

(a) Any person who is aggrieved by any action of the Board involving or arising from the enforcement of this Rule (other than failure to pass the bar examination) may petition the the Board for such relief as is within the jurisdiction of the Board to grant.

(b) Any such petition must: (i) be in writing, under oath; (ii) be

filed with the Administrator within 30 days after notice of such action by the Board; and (iii) must state with reasonable particularity the relief with is sought and the grounds thereof.

(c) Any such petition may: (i) be accompanied by such affidavits and other documentary evidence as the petitioners may deem appropriate; (ii) may be supported by a brief setting forth pertinent authority and arguments; and (iii) may ask the Board to set the matter for hearing.

(d) The Board may order a hearing of any such petition on its own motion.

Petitioners complied with all applicable sections of the Rule in petitioning the Board for a hearing. Initially, they were ignored. Respondent Burson even stated at one point during the time petitioners' petition was pending that he knew nothing of their petition.

13.03 Hearings Before Board

(A) The Administrator shall serve notice on the petitioner or the respondent to a show cause order and any other interested parties fixing the time and place of the hearing and indicating the matters to be heard.

The president of the Board consented to a hearing in an informal

letter to petitioners and advised them to contact the administrator in order to set the date for the hearing. The petitioners did as advised; the hearing was set in a letter to the petitioners from the administrator. Immediately after receiving petitioners' petition, brief, and motions pursuant to the Rule, the administrator, by phone, promptly revoked the said hearing. Shortly thereafter, the "order" was sent to petitioners.

12.12 No Power to Waive or Modify Rule of Court

Except as expressly provided in this rule, the Board has no power to waive or modify any provision of this Rule.

For the various reasons set out above, petitioners maintain that respondents have also violated this section of the Rule. Respondents have not only waived and modified this Rule 7 of the court, they have also, in effect, destroyed the spirit and purpose of Rule 7. Therefore, the respondents were not acting as an arm or surrogate of the court, nor were they acting in a judicial capacity. These respondents were not even acting within their ministerial capacity for which they are entitled to no immunity. The Tennessee Supreme Court has clearly stated in State ex. rel. Carden v. Fones, 539 S.W.2d 810 (Tenn. 1976) that if the agency Board member is accused of any wrongdoing, he is to be sued in a regular court of

law. Thus, both the state and federal law prohibit the blanket immunity which has been granted to the respondents in this case.

Tennessee Supreme Court Rule 7 was obviously designed to protect examinees from any biases and prejudices the examiners may harbor. These black petitioners alleged that the individual members of the Board did not certify them for admission to the Tennessee State Bar in spite of the fact that petitioners met the previously published standard for passing the multi-state portion of the exam. (Tennessee requires a score of at 130. Petitioners obtained scores of 145 and 153.) Petitioners also met the previously announced minimum competency standard for the essay, however, were

later told that petitioners had to meet a higher standard of one hundred percent. (These documents include a sworn affidavit by petitioner Hampton as to respondent Chambliss' statement regarding the 100% requirement as well as respondent Chambliss' own "confidential" letter attesting to the accuracy of petitioner Hampton's statement. These documents were both removed mysteriously from the circuit court record and subsequently had to be replaced by the petitioners when petitioners were attempting to have the record certified for appeal in the Tennessee Supreme Court of Appeals). As pointed out above, the president of the Board stated that all graders know the identity of examinees and that the standard for grading changed from paper

to paper. The Tennessee Supreme Court through Rule 7 demands complete anonymity until all papers are graded. The Board members administered the exam, proctored the exam, and graded the exam. The court did not discuss these violations or any other Board action, whereas the court in Sparks gave a full discussion of the committee members' action in that case.

Petitioners in the instant case maintain that they are not like the parties in the Sparks case in that the facts and circumstances surrounding the parties are totally different. In the Sparks case, as in the one under consideration, the key factors were the authorized duties of the parties and whether the defendants were within or without those authorized duties. The

Kentucky Supreme Court specifically found that the non-judicial defendants were acting pursuant to the command imposed upon them by the Kentucky Supreme Court. Thus, the defendants were found to be immune. The courts in this case have made no such finding, obviously, because the respondents have admitted in sworn affidavits filed with both the Tennessee Supreme Court and the circuit court that they did in fact violate the very rule granting their authority and governing any action on their part.

The Attorney General for the State of Tennessee representing all respondents has always simply argued that the respondents are immune from liability for their actions simply because they are associated with the

Supreme Court or the state itself. (During the four years of these proceedings respondent Burson has gone from being secretary of the Board to the position of president of the Board and later to the position of Attorney General for the State of Tennessee. Now the Attorney General is a key respondent who has admitted his violations of Rule 7.) The lower courts have at all times accepted the simple argument of the State Attorney General. The judge by designate in the circuit court offered no further statement in his judgment except that the state respondents are all immune. The appellate court went so far as to state in its opinion that the trial court's judgment was rendered upon different "incomplete or erroneous

grounds." The appellate court, however, then went on to affirm the trial court's judgment without offering any ground other than that of the trial court--absolute immunity for all state defendants.

The appellate court did nothing to explain how the trial court was different, incomplete and/or erroneous. Neither did the appellate court do anything to explain why it affirmed the trial court other than to say that "after a complete review of this record, we are of the opinion that the trial court reached the right result, although in some respects for reasons different from those of this Court." Of course, the appellate court did not explain this conclusion either.

The appellate court opinion also makes much of the power and authority of the Tennessee Supreme Court to create the Board. That power has never been challenged by these petitioners. Therefore, it is not an issue in this case. In fact, that power and authority of the court confirms and supports petitioners' allegations that the court rule governed the Board's action requiring the members' adherence to the following section of Rule 7:

The Supreme Court shall prescribe rules to regulate the admission of persons to practice law and providing for a uniform system of examination, which shall govern and control admission to practice law and to regulate such board in the performance of its duties. T.C.A. 23-1-103.

Therefore, when the Rule was violated, so were the petitioners' rights to the protection that the Rule provided. It follows that any grant of immunity that the members may have had initially was subsequently lost. The Board members did not have unbridled discretion to "pick and choose" applicants to certify to the court for admission to the Tennessee State Bar.

The appellate court opinion also addresses those sections of the Rule that govern the actions of the Bar examinees--specifically their right to petition the Tennessee Supreme Court for review of the Board's actions. Petitioners exercised their rights under the Rule. The court denied the

petitioners' petition for writ of certiorari. The Tennessee Supreme court gave no specific reasons for denying the writ. Petitioners request this court to take note of the fact that Chamberlain v. Brown, 442 S.W.2d 248 (Tenn. 1969), was the controlling case at the time the court denied petitioners' petition for writ of certorari. In Chamberlain the Tennessee Supreme Court specifically and very adamantly stated that the state of Tennessee would not entertain suits brought under the Federal Civil Rights Statutes U.S.C. Sections 1983 and 1985. This decision clearly showed the court's intent to decline the concurrent jurisdiction with the federal courts in hearing these federal claims.

The allegations and claims in the instant case have been brought under the federal civil rights statutes. At the time petitioners petitioned the Board for a hearing the federal claims were raised. The Board stated that it had no jurisdiction to hear such claims. At the time petitioners petitioned the Tennessee Supreme for writ of certiorari the federal claims were raised. Of course, when the Board and the Tennessee Supreme Court declined to hear petitioners' federal claims, no adjudication of these claims could have taken place.

Having exhausted all state remedies, the petitioners filed suit in federal court. Ten days after this filing, the Tennessee Supreme Court reversed Chamberlain in Poling v. Goins

Supreme Court No. 27 (June 30, 1986).

In Poling the court stated that now lower state courts must hear claims of constitutional violations of plaintiffs' rights by persons under color of state law. The court offered three (3) major reasons for this apparent change of heart after seventeen years of refusing to hear such cases. They are as follows:

(1) This would bring Tennessee more in line with other state courts.

(2) The state citizens have a right to bring these claims in the state courts.

(3) The appellate court urged the Court to reconsider its views expressed in Chamberlain.

The opinion of the court in Poling gave no hint of an intent to grant absolute immunity to all state defendants against which claims of violation of federally protected rights have been made. This grant of immunity merely because the defendants work for the state is in effect the same as not entertaining the suits at all. However, allowing the cases to be brought in state court provides an element of control over the parties. It enables the state attorney general and the courts to keep the plaintiffs entangled in the state courts relying upon the opinion expressed in Poling. It also allows the judge to arrive at the desired result without following established laws applicable to facts in the cases in question. If the cases

could only be brought in the federal courts, the state would have no such control and the applicable laws may very well be enforced against a defendant who works for the state.

The legislative history of these federal civil rights statutes will show that the facts and circumstances surrounding this case are identical to the ones that prompted these federal laws in the first place. To allow a state court to accept the jurisdiction over federal civil rights claims and then to allow the court to grant blanket immunity to state defendants is to allow a complete abrogation of the statutes which were designed to alleviate the lack of an adequate remedy for the harm done to U. S. citizens by defendants under color of some state law.

The state of Tennessee after seventeen (17) years of refusing to recognize federal civil rights claims is now attempting to "repeal" the federal statutes in the state of Tennessee. If Tennessee courts can "repeal" federal laws, it follows that any state can make any undesirable federal laws null and void in that state. This, of course, is not within the jurisdiction of the courts. The courts are to enforce the laws for and against every citizen regardless of race, creed or color.

Immunity, if any, does not extend to the individual members of the Board. Government entities, as a class, can not be totally exempt by virtue of some absolute immunity from liability under terms of 42 U.S.C.

Section 1983 since the statute encompasses within its scope misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law. See Scheuer v. Rhodes, 416 U.S. 232 (1974).

Federal rights can not be denied by the passage of state immunity law. See Avela v. Wildwood, 595 F.Supp 5111, D.C. N.5, (1984) No grant of immunity by the state is binding in an action brought under 42 U.S.C. Section 1983. See Atchison, T.S.F.R. Co. v. Lopez, 531 P2d 455 (1975).

Only judges are entitled to absolute judicial immunity when performing acts in their judicial capacity. Even judges are not absolutely immune from damages when

acting outside their judicial capacity. See Stump v. Sparkman, 98 S.Ct. 1049 (1978). In determining whether a state defendant has violated 42 U.S.C. Section 1983 it is necessary to make the factual finding of whether or not the defendant acted in good faith within the scope of authority granted to him by the state law. Certainly, even a judge can not hide behind his judicial robe when he violates the law and commits legal wrongs against individual citizens. Therefore, it stands to reason that these individual respondents can not hide behind the judge's cloak of immunity since they have willfully and admittedly violated Tennessee Supreme Court Rule 7 which was promulgated by the Court to govern Board action.

These violations place these respondents outside the realm of authority given to them by the Tennessee Supreme Court.

The federal civil rights statutes U.S.C. Sections 1983 and 1985 have not been repealed and there is no blanket immunity given to any defendant "persons" in these laws. Therefore, it is axiomatic that no grant of absolute immunity by the state court will be controlling in these cases. No legitimate state interest is served by allowing state agents and courts to discriminate against certain groups of citizens with certain types of claims.

This is a serious case and will affect the lives of many people. The procedures and practices instituted in this state can destroy more lives by

unjustly crushing the career goals and aspirations of many state citizens. Futhermore, these citizens will have no means of legal redress for the wrongs dealt them by the state agents. To allow this state court ruling to stand will put state citizens and state agents on notice that citizens are not protected and that state agents can do whatever they wish even in disregard of state, federal and constitutional laws.

Petitioners have presented their argument in the above manner in order to demonstrate to this United States Supreme Court hat the record contained sufficient factual evidence, in the way of admissions by the respondents absent any denials warranting an examination by the state courts into whether the acts of the individually named

respondent Board members did in fact violate the petitioners' rights that were protected by Tennessee Supreme Court Rule 7 and for which 42 U.S.C. Sections 1983 and 1985 provided a remedy. There was sufficient evidence in the record to show that no immunity of any kind was warranted for the respondents in this case and for all of the reasons set out above, petitioners' petition should be granted in order that the lower state court rulings may be corrected to reflect the true intentions of Congress in enacting the federal civil rights statutes.

Respectfully submitted on this the 14th day of August 1989.

CERTIFICATE OF SERVICE

Plaintiffs/Appellants do hereby certify that a true and exact copy of the foregoing Petition For Writ Of Certiorari has been forwarded by U.S. mail, postage prepaid to:

Mr. William Young
450 James Robertson Parkway
Nashville, TN 37219

Linda A. Hampton ROH
Linda A. Hampton, Pro Se

Rose O. Howard
Rose O. Howard, Pro Se

APPENDIX

BEFORE THE BOARD OF LAW EXAMINERS OF TENNESSEE

IN RE: LINDA A. HAMPTON-PETITIONS

DOCKET NO. 85-35

ROSE O. HOWARD-PETITIONS

DOCKET NO. 85-36

ORDER

This matter is before the Board on the joint petitions filed by Linda A. Hampton and Rose O. Howard (the "Petitioners took the July 1985 Bar Examination. Ms. Hampton received a scaled score of 153 on the MBE portion of the examination, initially passed three of twelve essay questions and on regrading of her failing papers passed one additional essay question. The passing of seven essay questions is necessary for passing the examination regardless of the MBE score. Thus, Ms. Hampton failed the examination.

Ms. Howard received a scaled score of 145 on the MBE portion of the examination,

and on regrading her failing papers passed one additional essay question. Thus, Ms. Howard also failed examination.

The initial "Petition" dated October 25, 1989 was in letter form and asked that the Board review the tallying of the scores submitted to the Board and forward to the Petitioners certain information "in order that we may better prepare for the February 1986 Essay Examination." The "Petition" concluded, "We shall expect a response from you within two weeks." The "Petition" was accompanied by an affidavit reciting that Ms. Katherine Darden, Administrator of the Board, had been contacted and asked what procedures should be followed in order to get assurances from the Board that no error had been made. The affidavit states that Ms. Darden responded that if they were seeking to change their score that could not be done. The affidavit then goes on to state that the Petitioners stated that, "we did not want to change the examination

score, but that we wanted to know the procedures provided in order that we may get some explanation on the inconsistencies of our scores."

The Board and its assistants in recent years have followed the practice of informally discussing failing papers with applicants who fail the essay examinations. Mr. Sanford, on behalf of the Board, responded to the Petitioners' initial "Petition" by letter dated November 20, 1985 by suggesting that the Petitioners here follow that practice. That letter also gave certain explanations of the examination process.

In the meantime, having been told orally that such a practice was followed, the Petitioners wrote a letter dated November 12, 1985 to the Board members and assistants who had graded their failing papers reciting that a member of the Board and the Administrator had suggested that the Petitioners follow that practice and asked for appointments for such discussions and

certain other information. Petitioner Hampton then contacted Mr. Prince Chambliss, one of the assistants to the Board, and Mr. Charles Burson of the Board. The Petitioners then filed: (i) a Petition dated November 20, 1985 requesting that they be sent copies of the Board's minute book containing any and all Court approved policies; (ii) a letter dated November 19, 1985 stating that, "Since Mr. Chambliss did not grant any of the relief requested in our petition, we conclude that efforts to talk to other examiners will also be futile"; (iii) a "Petition for Information" requesting the Board to answer nineteen (19) questions; (iv) a "Petition for Hearing" requesting a hearing on their Petition filed on or about October 28, 1985; and (v) affidavits purporting to give verbatim accounts of conversations between the Petitioner Hampton and Messrs. Burson and Chambliss and Ms. Darden.

On November 20, 1985, Ms. Darden wrote a letter to Petitioners enclosing a copy

of the Board's Report to the Tennessee Supreme Court and advising them that the matter was set for hearing on Monday, December 9, 1985 at the Board's offices in Nashville at 10:30 a.m.

On the date of November 24, 1985, Petitioners wrote a letter to "Administrator" in which they stated, "The matters to be heard in this formal hearing are set out in page (i) of Petitioners' Brief. Pursuant to Section 13.03(a), you are, therefore, required to indicate to Petitioners that such matters are to be heard."

In addition, Petitioners referred to certain "motions" which they asked the Board to grant; characterized the statements and documents contained in the letters of Mr. Sanford and the Administrator as "unresponsive, inconsistent, illogical, without merit, in bad faith and outrageously insulting"; and contended that these statements and documents "only serve to reaffirm petitioners contentions that the actions of the Board are performed not only

arbitrarily and capriciously, but also, as to these petitioners, willfully and maliciously, thereby inflicting further physical, emotional and mental distress upon them."

Petitioners also submitted a document entitled "Petitioners' Brief and Preliminary Motions," which begins with a statement of "Issue To Be Heard," contains an argument and concludes with the charge that the failure of the Board to certify Petitioners violated Petitioners' right to due process and equal protection under the Fourteenth Amendment to the United States Constitution and asks that the Petitioners be certified for admission.

Petitioners include at the end of their Brief "PRELIMINARY MOTIONS TO INSURE A FAIR AND JUST HEARING," as follows:

1. That the matter be set for hearing on Monday, December 9 at 10:30 a.m. in the offices of the Board and

2. That the matter to be heard be

stated as on page (i) of petitioners' brief and

3. That the current Board of Tennessee Law Examiners formally request the Tennessee Supreme Court to temporarily remove this Board and appoint a substitute Board to provide petitioners with an unbiased tribunal (see page 8 of petitioners' brief) and

4. That all specific information requested in previous petitions (dated October 25, November 19, November 20) be forwarded to petitioners on or about Monday, December 2 in order that they may have a fair opportunity to meet their burden of proof and

5. That the Board forward to petitioner any other information that is competent, relevant and material to the matter to be heard and

6. That the Board subpoena for cross examination all interested parties which would include, but is not limited to, all 12 essay examiners, all 3 Board members, and the administrator pursuant to Section

13.03(i) and

7. Waiver of Section 13.03(j) costs assessed to petitioners and

8. Waiver of notice of intent to take the Bar Examination as well as waiver of late application filing fees pending disposition of this matter

OR - IN THE ALTERNATIVE

9. THAT PETITIONERS BE CERTIFIED FOR ADMISSION TO THE TENNESSEE BAR EFFECTIVE AS OF OCTOBER 13, 1985 WITH ALL RIGHTS AND PRIVILEGES AND

10. THAT THE TENNESSEE BOARD OF LAW EXAMINERS PUBLISH TO THE WORLD SUCH CERTIFICATION."

Thus, it is evident that the grievance of Petitioners in this proceeding arises from their failure to pass the Bar Examination. The sole remedy for that grievance is the opportunity to retake the Examination. Section 14.04 of Rule 7 of the Rules of Tennessee Supreme Court. Petitioners have the same opportunity to retake the Examination as all others who

failed the July Examination.

The board will treat Petitioners' statements as a notice of intent, but Petitioners must file the required supplemental application and pay the requisite fees just as any other applicant for re-examination in order to take the February 1986 Tennessee Bar Examination.

Petitioners state that the sole issue which they seek to have the Board determine on the hearing is the constitutionality of the Board's procedures. The relief sought by Petitioners is certification for admission on the ground that the Board's procedures are constitutionally defective.

This Board has no jurisdiction to determine such constitutional issues and no jurisdiction to grant the relief which Petitioners seek.

Petitioners' motions 4, 5 and 6 all relate to evidence which Petitioners seek in support of their position with respect to the sole issue which Petitioners seek to have the Board determine. Since that

issue cannot be determined by this Board, no useful purpose would be served by the granting of these motions and they are accordingly denied.

The Board construes the Petitioners' third motion as a motion for recusal. The basis for that motion is set forth at pages 7-9 of Petitioners' Brief, i.e., the contention that the fact that the Board members are also examiners demonstrates that they are biased. Petitioners cite no authority which supports that contention. The Board finds it to be without merit. In any event, since the Board, however, constituted, has no jurisdiction to determine the constitutional issue which Petitioners raise, no useful purpose would be served by such a recusal. Accordingly, Petitioners' third motion is denied.

The Board has no power to waive the per diem charge of the Court Reporter or the cost of transcription of the record and of Section 13.03(j). Therefore, Petitioners' seventh motion is denied.

This matter was originally set for hearing before the Board received the Petitioners' letter dated November 24, 1985 and the Brief and Motions accompanying it. As heretofore indicated, this Board has no jurisdiction to grant the principal relief which Petitioners now seek. The disposition here made of Petitioners' "Preliminary Motions" also disposes of the occasion for a hearing with respect to those matters.

The offer to afford Petitioners a hearing was based on Petitioners' original letter of October 25, 1989 and the affidavit filed in support thereof, wherein it appeared that Petitioners were merely seeking an explanation from the Board of what Petitioners characterized as "inconsistencies" in their scores, as Petitioners stated, "In order that we might better prepare for the February 1986 Examination." The hearing was set in order to afford Petitioners an expeditious and convenient means of understanding the Board's procedures in the light of that statement.

Whatever may have been the original intention of the Petitioners, it is now evident that the relief they seek is the change in the Examination score which they disavowed in their affidavit of October 25, 1986.

Accordingly, it now appears that Petitioners are not now seeking any relief which is within the jurisdiction of this Board to grant at a hearing.

It is, therefore, ORDERED that:

1. The Petitions of Linda A. Hampton and Rose O. Howard be and hereby are denied;

2. The Preliminary Motions of Linda A. Hampton and Rose O. Howard be and hereby are denied, except that Petitioners' statement will be accepted as a notice of intent to take the February 1986 Bar Examination; and

3. The hearing heretofore scheduled for December 9, 1985 is cancelled.

Val Sanford, President
Wheeler A. Rosenbalm, Vice President
Charles W. Burson, Secretary/Treasurer

Attest:

/s/
Katherine Darden, Administrator

Dated: December 2, 1985

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

LINDA A. HAMPTON AND ROSE O. HOWARD, Petitioners, v. TENNESSEE BOARD OF LAW EXAMINERS, JOINTLY AND SEVERALLY, KATHERINE DARDEN, ET AL., Defendants.	No. 86-I-8

ORDER

Upon consideration of the Petition for Writ of Certiorari filed by the Petitioners, the memorandum in support thereof, and the Response filed by the Office of the Attorney General, the Court is of the opinion that the Petition should be and the same is hereby denied.

Costs will be borne by the Petitioners.

PER CURIAM

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

LINDA A. HAMPTON AND ROSE O. HOWARD,	*	
Plaintiffs,	*	
VS.	*	NO. 86-2476 GB
TENNESSEE BOARD OF LAW EXAMINERS, et al,	*	
Defendants.	*	

ORDER OF DISMISSAL

Plaintiffs allege violations of their due process and equal protection rights by defendants for plaintiffs' non-admission to the Tennessee bar. They seek relief under 42 U.S.C. §§1983 and 1985. Plaintiffs contends that they were denied admission to the bar because of, or in furtherance of a conspiracy or conspiracies to admit bar applicants under an unspecified quota system.

Plaintiffs took the July 1985 bar examination and failed the essay portion. Plaintiffs petitioned the defendant Board of Law Examiners, seeking a hearing to ascertain the standards on which the exam was graded. The Board denied plaintiffs' petition; however, plaintiffs were allegedly told informally that no standards were used but that the examination was of a competitive nature. This competition is what plaintiffs assert is a quota system. Plaintiffs petitioned the Tennessee Supreme Court for review of the Board's procedures and policies. This petition was pending when plaintiffs took the February 1986 bar exam. Plaintiffs allege that during this second examination defendants intentionally memorized plaintiffs' examination numbers and intentionally failed plaintiffs. They further contend that the identification procedures for the examination were such that anonymity was lacking and that personal bias influenced whether a particular applicant failed or passed the examination.

Plaintiffs claim that these actions on the part of the defendants deprived them of their due process and equal protection rights, violated Section 8 of the Tennessee Constitution and Tennessee Supreme Court Rule 7 and constituted fraudulent misrepresentation, defamation, outrageous conduct and intentional infliction of emotional distress.

Defendants move to dismiss the action for lack of subject matter jurisdiction under Fed.R.Civ.P. 12. Defendants contend that the federal court has no jurisdiction to entertain a cause of action based on non-admission to the state bar, unless plaintiff attacks the specific rules established by the state. For the following reasons, the court agrees and defendants' motion is granted.

Courts have recognized that there is a fundamental difference between a claim that a state has unlawfully denied a particular applicant or applicants admission

to the bar, and a claim that the rules and regulations generally governing admission to its bar are unconstitutional. Delgado v. McTighe, 442 F. Supp. 725 (E.D. Pa. 1977). Federal courts have jurisdiction only where the constitutional validity of those rules is questioned, and not where application of the rules to a specific person or persons is challenged. Ktsanes v. Underwood, 552 F.2d 740 (7th Cir. 1977). Federal courts do have jurisdiction over constitutional claims attacking states' power to license attorneys or their rule-making authority or administration of the rules. Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976). Plaintiffs, however, are attacking the application of the state rules to themselves, and are not attacking the constitutionality of the rules in general. For this reason, they fall into the category of cases where the proper avenue for complaints would be to petition the Board of Law Examiners with a grievance, then appeal the Board's decision to the Tennessee Supreme Court and then seek

review of the Tennessee Supreme Court decision by petition for certiorari in the United States Supreme Court. See District of Columbia Court of Appeals v. Feldman, 460 U. S. 462 (1983); Ktsanes, 552 F.2d 740; Pringle, 550 F.2d 596; Feldman v. Board of Law Examiners, 438 F.2d 699 (8th cir. 1971); Arvelo v. Supreme Court of Puerto Rico, 382 F. Supp. 510 (D.P.R. 1974). "Orders of a state court relating to the admission, discipline and disbarment of members of its bar, may be reviewed only by the Supreme Court of the United States on certiorari to the state court and not by means of an original action in a lower federal court." MacKay v. Nesbett, 412 F.2d 846 (9th Cir. 1969). The rule of review by the states courts and ultimately the United States Supreme Court applies even when a disgruntled bar applicant couches his federal court complaint in terms of a civil rights claim under 42 U.S.C. §1983 rather than a request to review and reverse the state bar examiners' action. Pringle, 550 F.2d at

at 599; Feldman v. State Bd. of Law Examiners, 438 F.2d 699 (8th Cir. 1971).

Plaintiffs argue that, because they have already requested review of the Board decision in the Tennessee Supreme Court and were denied review, they are without any avenue of appeal if they are not allowed to sue in federal district court. This argument is without merit.

Plaintiffs' complaint indicates that plaintiffs never raised their claims of unconstitutional application of the state procedures before the Board or before the Tennessee Supreme Court. Instead, plaintiffs' sole petition to the Board and to the state supreme court requested simply a clarification of procedures used in grading. See Plaintiffs' Complaint ¶7-9. This petition was filed after their first exam. After Board action on the request, the Tennessee Supreme Court denied certiorari. Plaintiffs did not seek review in the United States Supreme Court. No petition was filed before the Board or any

other state forum regarding the second exam, during which the unconstitutional actions allegedly occurred. Thus, the assertions about unconstitutional application of procedures have never been raised in any state forum.

Plaintiffs' contention that there is no state forum in which their claims can be heard is apparently based in part on Tennessee Supreme Court Rule 7. That rule states in part: "Any person aggrieved by any action of the Board may petition this Court for a review thereof, as under the common law writ of certiorari." Tennessee Supreme Court Rule 7 §14.01. The Rule further provides that "[t]he only remedy afforded for a grievance for failure to pass the bar examination shall be right to re-examination as herein provided." Tennessee Supreme Court Rule 7 §14.04. Plaintiffs indicate that the Board denied their original petition because it solely challenged their failure of the examination. If their current grievance is also classified as "a grievance

for failure to pass the bar exam," over which review is prohibited under Rule 7, then they could not obtain the relief sought here in a state forum. Whether the Board and the Tennessee Supreme Court would so categorize this complaint is uncertain, and a decision about whether review is barred depends on an interpretation of Rule 7. The proper interpretation of the rule, however, is one that should be decided by the Tennessee courts and not by this court.

Plaintiffs further contend that their claim cannot be heard in state court because the Tennessee courts will not hear §1983 actions. They cite Chamberlain v. Brown, 223 Tenn. 25, 442 S.W.2d 248 (1969), in support of this proposition. On June 30, 1986, the Tennessee Supreme Court overruled Chamberlain in Poling v. Goins, Supreme Court No. 227. In that case, the Supreme Court held that federal courts do not have exclusive jurisdiction over §1983 claims, and that Tennessee courts will hear those claims. This ruling defeats plaintiffs'

claim that they will be left without a forum to hear the case.

Plaintiffs also contend that this court has subject matter jurisdiction because their complaint, in the alternative, alleges that Rule 7 is unconstitutional. However, liberally reading the complaint, this court does not find it to be a challenge to the constitutionality of the Rule. Rather, the allegation is that the Rule is unconstitutional as applied to plaintiffs. In this regard, this allegation is no different than the other allegations in the complaint, as far as jurisdiction is concerned.

In addition to their federal claims, plaintiffs allege several pendent state claims including fraudulent misrepresentation, defamation, and intentional infliction of emotional distress. However, once the federal claims are dismissed, the federal district court has broad discretion whether or not to dismiss the pendent claims. See Moor v. County

of Alameda, 411 U.S. 93 (1972), reh. denied, 412 U.S. 963, overruled on other grounds, Monell v. Dept. of Social Services, 436 U.S. 658 (1978). In this case the court sees no reason to exercise jurisdiction over the state claims.

The entire case is dismissed.

IT IS SO ORDERED.

/s/
JULIA SMITH GIBBONS
UNITED STATES DISTRICT JUDGE

DATE

NO. 86-6057

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LINDA A. HAMPTON AND ROSE O. HOWARD, Plaintiffs-Appellants, v. TENNESSEE BOARD OF LAW EXAMINERS, JOINTLY AND SEVERALLY; KATHERINE DARDEN, WHEELER ROSENBALM; CHARLES BURSON; VALERIUS SANFORD; LEWIS HAGOOD; JOSEPH TIPTON; MICHAEL WHITAKER; RODNEY V. AHLES; SCOTT MCGINNESS; PRINCE CHAMBLISS; ELLEN VERGOS, AND OTHER UNKNOWN EXAMINERS; CECIL C. HUMPHREYS SCHOOL OF LAW; FRANCIS SULLIVAN; DANIEL WANAT; ROBERT BANKS; AND NANCY BARRON, Defendants-Appellees.	)	O R D E R

BEFORE: KEITH and NORRIS, Circuit Judges; and PECK, Senior Circuit Judge.

This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and the parties' briefs, this

panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

Plaintiffs filed this civil action for declaratory, injunctive and monetary relief pursuant to 42 U.S.C. §§ 1983 and 1985 alleging constitutional violations in regard to their applications for admission to the state bar of Tennessee. The district court granted defendants' motion to dismiss. This appeal followed.

Plaintiffs have not alleged that a particular law or rule is unconstitutional, but rather attack the manner in which the state rules were applied to their particular bar applications. For this their remedy, if any, must be through the Tennessee courts and then by direct appeal to the United States Supreme Court. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976), cert. denied, 431 U.S. 916 (1977); Ginger v. Circuit Court for County

of Wayne, 372 F.2d 621 (6th Cir.), cert. denied, 387 U.S. 935 (1967). Plaintiffs cannot invoke the jurisdiction of the federal courts merely by couching their claim for relief in terms of 42 U.S.C. § 1983 when they are actually seeking relief for their denial of admission to the bar.

Accordingly, it is ORDERED that the judgment of the district court is affirmed. Rule 9(b) (5), Rules of the Sixth Circuit.

ENTERED BY ORDER TO THE COURT

/s/ _____

Clerk

IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTEENTH JUDICIAL DISTRICT OF MEMPHIS

LINDA A. HAMPTON AND ROSE O. HOWARD,	)	
Plaintiff,	)	
vs.	)	Case No. 17479TD, Div. 9
TENNESSEE BOARD OF LAW EXAMINERS, jointly and severally, Katherine Darden, Wheeler Rosenbalm, Charles Burson, Valerius Sanford, Lewis Hagood, Joseph Tipton, Michael Whitaker, Rodney V. Ahles, Scott McGinness, Prince Chambliss, Ellen Vergos, other unknown examiners, MEMPHIS STATE UNIVERSITY'S CECIL C. HUMPHREYS SCHOOL OF LAW, Thomas Carpenter, Claude Kaufman, Francis Sullivan, Daniel Wanat, Robert Banks, Nancy Barron,	)	
Defendants.	)	

ORDER STAYING PROCEEDINGS

This matter came before this Court for a hearing on January 9, 1987, on the

Plaintiffs' Motion for Partial Summary Judgment and Motion to Commence Discovery.

The pleadings in this case indicate that the Plaintiffs' previously filed the same Complaint pending in this Court in the United States District Court for the Western District of Tennessee. The District Court dismissed this Complaint for lack of subject matter jurisdiction by an Order dated September 23, 1986. The Plaintiffs filed a Notice of Appeal from this Order on October 3, 1986, which is presently pending before the United States Court of Appeals for the Sixth Circuit.

WHEREFORE, since the Plaintiffs' Complaint filed with the District Court has not yet been completely resolved, this Court hereby ORDERS, ADJUDGES, and DECREES that all proceedings in this case are stayed pending a final resolution of the Plaintiffs' Complaint filed in the United States District Court for the Western District of Tennessee.

IT IS, THEREFORE, SO ORDERED.

/s/
ROBERT L. CHILDERS
CIRCUIT COURT JUDGE, DIVISION 9

PREPARED FOR ENTRY BY:

/s/
WILLIAM E. YOUNG
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-1902

IN THE THIRTEENTH JUDICIAL DISTRICT
FOR THE STATE OF TENNESSEE
SHELBY LAW

LINDA A HAMPTON ROSE O. HOWARD, Plaintiffs	§	
V.	§	NO. 17479 Div. 9
TENNESSEE BOARD OF LAW EXAMINERS, et al Defendants	§	

MEMORANDUM OPINION

The plaintiffs seek declaratory and injunctive relief, together with monetary damages, against the past and present members of the Board of Law Examiners, adjunct examiners, the Memphis State University Law School, and certain faculty members, to redress the asserted deprivation of their right to procedural due process and equal protection as guaranteed to them by the fourteenth amendment, and 42 USC 1983, 1985.

The past of present members of the Board of Law Examiners move for summary judgment upon the ground of absolute judicial

immunity. They insist that the Board is a surrogate of the Supreme Court of Tennessee, and that its members possess judicial immunity. This argument is well taken. See, Belmont v. Board, 511 SW2d 461 (1974).

The defendant Memphis State University School of Law moves for summary judgment upon the ground of absolute immunity. This motion is well-taken; Memphis State is an arm of the State. The point is well-settled and beyond peradventure. Applewhite v. M.S.U., 495 SW2d 190 (1973).

The remaining defendants are granted immunity by TCA 9-8-307(h).

In any event, as the State argues, if it may be said that the Act creating the Tennessee Claims Commission waived its immunity, (T.C.A. 9-8-307 et seq.) for wilful or malicious actions, the plaintiffs must seek redress before the Commission, and this Court is without subject matter jurisdiction.

The Motion for Summary Judgment is sustained upon all grounds.

/s/
WILLIAM H. INMAN, JUDGE
BY DESIGNATION

The Clerk will serve copies hereof on William Young, Assistant Attorney General, 450 James Robertson Parkway, Nashville, 37219, and upon Linda Hamilton, 72 Lydgate Avenue, Memphis, 38109, and Rose O. Howard, 2093 Jamie Drive, Memphis, 38116.

/s/
JUDGE

IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTEENTH JUDICIAL DISTRICT OF MEMPHIS

LINDA A. HAMPTON and ROSE O. HOWARD,	)	
Plaintiffs,	)	
V.	)	Case No.17479TD
	)	Division 9
TENNESSEE BOARD OF LAW EXAMINERS, jointly and severally, Katherine Darden, Wheeler Rosenbalm, Charles Burson, Valerius Sanford, Lewis Hagood, Joseph Tipton, Michael Whitaker, Rodney V. Ahles, Scott McGinness, Prince Chambliss, Ellen Vergos, other unknown examiners, MEMPHIS STATE UNIVERSITY'S CECIL C. HUMPHREYS SCHOOL OF LAW, Thomas Carpenter, Claude Kaufman, Francis Sullivan, Daniel Wanat, Robert Banks, Nancy Barron,	)	
Defendants.	)	

JUDGMENT

This matter is before this Court on the Defendants' motion to dismiss and/or for summary judgment. The Plaintiffs filed this Complaint seeking declaratory and injunctive relief, together with monetary damages, against the past and present members

of the Board of Law Examiners, adjunct examiners, the Memphis State University Law School, and certain faculty members, to redress the asserted deprivation of their right to procedural due process and equal protection as guaranteed to them by the Fourteenth Amendment, and 42 U.S.C. §§ 1983, 1985.

For the reasons stated in this Court's Memorandum Opinion, this Court hereby ORDERS, ADJUDGES and DECREES that the Defendants' motion for summary judgment is granted on all grounds and the Plaintiffs' Complaint is dismissed. The Court further ORDERS that all costs of the Shelby County Clerk's Office are disallowed due to the Clerk's failure to serve copies of the Memorandum Opinion on the parties to this lawsuit as directed by this court.

IT IS, THEREFORE, SO ORDERED.

Entered this _____ day of _____, 1988.

/s/
WILLIAM H. INMAN,
JUDGE BY DESIGNATION

IN THE COURT OF APPEALS OF TENNESSEE

WESTERN SECTION AT JACKSON

LINDA A. HAMPTON AND
ROSE O. HOWARD,

Plaintiffs-Appellants,

vs. Shelby Law

TENNESSEE BOARD OF LAW
EXAMINERS, jointly and
severally, Katherine
Darden, Wheeler Rosenbalm,
Charles Burson, Valerius
Sanford, Lewis Hagood,
Joseph Tipton, Michael
Whitaker, Rodney V. Ahles,
Scott McGinness, Prince
Chambliss, Ellen Vergos,
other unknown examiners,
MEMPHIS, STATE UNIVERSITY'S
CECIL C. HUMPHREYS SCHOOL
OF LAW, Thomas Carpenter,
Claude Kaufman, Francis
Sullivan, Daniel Wanat,
Robert Banks, Nance Barron,

Defendants-Appelless,

From the Circuit Court of Shelby County

Honorable Williams H. Inman,

Judge by Designation

Linda A. Hampton, Pro Se, of Memphis
Rose O. Howard, Pro Se, of Memphis

W. J. Michael Cody
Attorney General and Reporter
William E. Young
Assistant Attorney General
For Appellees

AFFIRMED

Opinion filed:

CRAWFORD, J.

Concur:

HIGHERS, J.

FARMER, J.

Plaintiffs, Linda A. Hampton and Rose O. Howard, filed this suit in the Circuit Court of Shelby County against the defendants named in the caption seeking declaratory and injunctive relief and monetary damages. The complaint describes and identifies the parties as follows:

* * *

2. Plaintiffs, Linda A. Hampton and Rose O. Howard, are citizens of the United States and residents of Memphis, Shelby County in the State of Tennessee. Plaintiffs were examinees on the July 1985, February 1986 and July 1986 bar examinations.

3. Defendants are citizens of the United States and residents of the State of Tennessee. Defendant, Tennessee Board of Law Examiners, is the state investigatory agency which is responsible for the certification of applicants to the Tennessee Supreme Court for admission to the Tennessee State Bar. Defendant, Katherine Darden, is the Administrator of the Board. Defendant, Valerius Sanford, is the president of the Board. Defendant, Charles Burson, is vice-president of the Board. Defendant, Wheeler Rosenbalm, is former vice-president of the Board. Defendants, Michael Whitaker, Lewis Hagood, Joseph Tipton, Rodney Ahles, W. Scott McGuinness, Prince Chambliss, and Ellen Vergos, are assistant examiners with the Board. Defendant, Claude Kaufman, is Dean of the Cecil C. Humphreys School of Law. Defendant, Francis Sullivan, is former Dean of Cecil C. Humphreys School of Law.

Defendant, Robert Banks, is a professor on staff at the law school. Defendant, Nancy Barron, is records secretary at the law school. Defendant, Thomas Carpenter, is president of the Memphis State University.

Plaintiffs allege as to the defendants, Board of Law Examiners, the individual members of the Board, and the adjunct examiners, as follows: That plaintiffs were failed by these defendants on the essay portion of the examinations, that the Board maintained no objective standards for determination of a passing or failing grade, and that in essence the competitive nature of the exam amounts to a fulfillment of quotas. They aver that they petitioned the Tennessee Supreme Court for writ of certiorari to seek review of the Board's action in denying them relief after the 1985 bar examination, and the proceeding was pending at the time they took the February, 1986 exam. They allege that in the taking of the subsequent examination, the defendants failed to accord them the anonymity provided by the rules of the Supreme Court and

intentionaly discriminated and retaliated against them. They aver that they were willfully and maliciously denied passing grades by the defendants.

As to Memphis State University and the individual defendants connected therewith, the complaint alleges that the defendant Board of Law Examiners conspired with the administration, faculty and staff of the school of law in determining who would be allowed to fill the "quota" of passing applicants, and further allege that the law school recommended that the Board should not pass these plaintiffs on the examination. The complaint further avers that after plaintiffs failed the examination, they sought advice from defendant Wanat, then Dean of the law school, and that he under the guise of helping them, attempted to steer them in the wrong direction in their efforts before the Board. They allege that defendant Banks, professor at the law school, while acting ostensibly as their friend and

confidant, was in fact betraying their confidence to the Board and advising the Board against the best interest of plaintiffs. They allege that defendant Barron provided grade certification on behalf of the law school.

Plaintiffs further contend as to the defendant Board and the individuals connected therewith that they were denied procedural due process and that these defendants' acts were violated of 42 U.S.C. §§ 1983, 1985. They further aver that the establishment of a quota denies their right to equal protection under the U. S. Constitution and that Tennessee Supreme Court Rule 7 was violated by the defendants.

The complaint further alleges that the defendants, Board of Law Examiners, and the individuals connected therewith, intentionally used policies and procedures designed to pass white applicants and fail black applicants and that this constituted outrageous conduct which caused plaintiffs to suffer severe emotional distress.

Plaintiffs also allege that they were induced to retake the bar examination by misrepresentation of these defendants. They further aver that the individual defendants at Memphis State University fraudulently led them to believe that they were competent to pass the bar examination upon graduation when they knew that the basis for a determination of passing was racially motivated.

Defendants responded to the complaint my Motion to Dismiss pursuant to Tenn.R.Civ.P. Rule 12.02 (1), lack of subject matter jurisdiction and Rule 12.02 (6), failure to state a claim upon which relief can be granted, or alternatively for summary judgment, pursuant to Rule 56, Tennessee Rules of Civil Procedure.

The judgment of the trial court dismissed plaintiffs' complaint for the reasons set out in the court's memorandum opinion which provides:

The plaintiffs seek declaratory and injunctive relief, together with monetary

damages, against the past and present members of the Board of Law Examiners, adjunct examiners, the Memphis State University Law School, and certain faculty members, to redress the asserted deprivation of their right to procedural due process and equal protection as guaranteed to them by the fourteenth amendment, and 42 USC 1983, 198.

The past and present members of the Board of Law Examiners move for summary judgment upon the ground of absolute judicial immunity. They insist that the Board is a surrogate of the Supreme Court of Tennessee, and that its members possess judicial immunity. This argument is well taken. See, Belmont v. Board, 511 SW2d 461 (1974).

The defendant Memphis State University School of Law moves for summary judgment upon the ground of absolute immunity. This motion is well-taken; Memphis State is an arm of the State. The point is well-settled and beyond peradventure. Applewhite v. M.S.U., 495 SW2d 190 (1973).

The remaining defendants are granted immunity by TCA 9-8-307(h).

In any event, as the State argues, if it may be said that the Act creating the Tennessee Claims Commission waived its immunity, (T.C.A. 9-8-307 et seq.) for wilful or malicious actions, the plaintiffs must seek redress before the Commission, and this Court is without subject matter jurisdiction.

The Motion for Summary Judgment is sustained upon all grounds.

Plaintiffs' brief sets out ten issues for review but we perceive the only real issues to be:

1. Whether the trial court erred in dismissing plaintiffs' complaint as to all

defendants, and

2. Whether the trial court erred in not ruling on plaintiffs' motions for discovery. We will consider the second issue first.

On December 8, 1986, plaintiffs filed two motions, each styled, "Plaintiffs' Motion for Discovery." We quote them in the order in which they appear in the record:

> Come now the Plaintiffs to move this court for discovery pursuant to Tennessee Supreme Court Rule 56.06 in order to further justify their opposition to the Defendants' Motion for Summary Judgment. In support of this motion Plaintiffs rely upon Argument IV of Plaintiffs' Response to defendants' Motion to Dismiss and/or for Summary Judgment to which this motion is attached and submitted affidavits. The aforenamed Plaintiffs move this court to grant discovery pursuant to Tennessee Rules of Civil Procedure 26 in order that they may prepare to try the factual issues in this cause.

The defendants' Motion to Dismiss or for Summary Judgment was filed November 6, 1986. We find nothing in the record to indicate that plaintiffs attempted to conduct any discovery procedure prior to the filing of the December 8, 1986 motion.

Discovery methods are established by Rule 26.01, Tennessee Rules of Civil Procedure, which provides:

Discovery Methods. - Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and, requests for admission.

Subsequent rules establish the procedure for utilizing the various discovery methods, all of which require direct proceedings between the parties, through their counsel if applicable, without the intervention of the court. Court intervention is contemplated under the rules only when a party does not comply with the rules regarding discovery. Rule 37, Tennessee Rules of Civil Procedure, is titled "Failure to Make or Cooperate in Discovery: Sanctions," and establishes the procedure for compelling discovery if the party has failed to comply with the rules.

As we previously noted in the case at bar, the record does not indicate that plaintiffs ever attempted to conduct discovery as provided by the rules nor is

there any failure on the part of the defendants to comply with established discovery procedures. Furthermore, the record does not reflect that plaintiffs ever attempted to bring before the court for a hearing their so-called "motions for discovery." Therefore, on the record before us, we cannot say that the trial court erred in not considering plaintiffs' motion for discovery.

We will now consider the first issue.

MEMPHIS STATE UNIVERSITY DEFENDANTS

Plaintiffs' complaint against Memphis State University's Cecil C. Humphreys School of Law seeks monetary damages for alleged conspiracy to prevent the plaintiffs from passing the bar examination ostensibly in violation of 42 U.S.C. §§ 1983, 1985 (3) (1982) which provide:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceedings for redress....

§ 1985 (3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance or the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one of more of the conspirators.

The complaint also alleges that misrepresentations by this defendant led plaintiffs to believe that when they obtained a degree from the law school they were qualified to pass the bar examination.

Memphis State University is a state institution to which the doctrine of sovereign immunity applies. **Dunn v. W. F. Jameson & Sons, inc.**, 569 S.W.2d 799 (Tenn. 1978); **Applewhite v. Memphis State**

University, 495 S.W.2d 190 (Tenn. 1973). This defendant as an arm of the state is not a "person" under § 1983. **Kompara v. Board of Regents,** 548 F. Supp. 537 (M.D. Tenn. 1982). The trial court correctly dismissed the case as to Memphis State University's Cecil C. Humphreys School of Law.

From our review of the complaint as it pertains to the individual defendants at Memphis State University, we find no allegations against defendants, Thomas Carpenter and Francis Sullivan. The only allegation as to defendant Barron is that she "provided grade certification on behalf of the law school." There is no statement of claim upon which relief can be granted against these three defendants, and the plaintiffs' suit against them was properly dismissed.

The complaint as to the remaining individual defendants connected with Memphis State University, defendant Wanat and defendant Banks, allege acts that could be considered to be acts in their individual

capacities, and thus cognizable in this proceeding. The complaint alleges that defendant Wanat attempted to thwart plaintiffs' efforts before the Board of Law Examiners and that defendant Banks was apparently betraying their confidences in working with the Board instead of with them. These defendants, in support of their motion for dismissal or for summary judgment, filed affidavits which specifically refute each and every allegations made against them by the plaintiffs.

Summay judgment is to be rendered by a trial court only when it is shown that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn.R.Civ.P. 56.03. In ruling on a motion for summary judgment, the trial court and the Court of Appeals must consider the matter in the same manner as a motion for a directed verdict made at the close of the plaintiff's proof, i.e., all the evidence must be viewed

in the light most favorable to the opponent of the motion and all legitimate conclusions of fact must be drawn in favor of the opponent. It is only when there is no disputed issue of material fact that a summary judgment should be granted by the trial court and sustained by the Court of Appeals. **Graves v. Anchor Wire Corp.**, 692 S.W.2d 420 (Tenn. App. 1985); **Bennett v. Mid-South Terminals Corp.**, 660 S.W.2d 799 (Tenn. App. 1983).

The record reflects no countervailing evidence produced in opposition to these defendants' affidavits. In **Fowler v. Happy Goodman Family**, 575 S.W.2d 496 (Tenn. 1978), Justice Harbison, now Chief Justice of our Supreme Court, said:

> A motion for summary judgment goes to the merits of the litigation. One faced with such a motion may neither ignore it nor threat it lightly. As stated in Rule 56.05, T.R.C.P.:
>
> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must

set forth specific facts showing that there is a geniune issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

575 S.W.2d at 498.

Considering this record as a whole and giving every inference in favor of the plaintiff, we are of the opinion that as to the allegations against defendant Wanat and Banks, there is no genuine issue as to any material fact, and summary judgment for these defendants was properly granted by the trial court.

BOARD OF LAW EXAMINERS DEFENDANTS

Relying on the doctrine of judicial immunity, the trial court dismissed the complaint as to the defendants Board of Law Examiners, the individual members of the Board, and the individual assistants to the Board members. The allegations against these individual defendants concern the manner in which the rules of the Supreme Court pertaining to the bar examination were applied to these plaintiffs. Plaintiffs also allege that the individuals defamed

plaintiffs by their publication that plaintiffs had failed the bar examination, that these individual defendants are guilty of outrageous conduct and that they made false representation to the plaintiffs inducing them to take the examination.

The Supreme Court of Tennessee has the inherent power to prescribe and administer rules pertaining to admission of attorneys to the practice of law. **Belmont v. Board of Law Examiners,** 511 S.W.2d 461 (Tenn. 1974). By act of the legislature, now codified as T.C.A. § 23-1-101 (Supp. 1988), the State Board of Law Examiners was created as part of the judicial branch of government under the complete dominion and control of the Supreme Court.

In addition to its inherent power and authority to govern admission to the bar, the legislature specifically provided that: "The Supreme Court shall prescribe rules to regulate the admission of persons to practice law and providing for a uniform

system of examinations, which shall govern and control admission to practice law, and to regulate such board in the performance of its duties." T.C.A. § 23-1-103 (1980). Under its power and authority the Supreme Court promulgated Rule 7 of the Rules of the Supreme Court which establishes a comprehensive system for admission to the Bar of Tennessee. Section 12.09 of Rule 7 specifically authorizes the Board, subject to the approval of the court to appoint attorneys as assistants to the Board to perform such duties as prescribed.

In **Sparks v. Character & Fitness Committee**, 818 F.2d 541 (6th Cir. 1987), the Court had before it a suit by an unsuccessful applicant to the Kentucky Bar. Suit was filed against the Kentucky Committee on Character and Fitness, its members, two other employees hired by the committee, one member of the Board of Bar Examiners and the Chief Justice of the Kentucky Supreme Court. The Plaintiff's complaint alleged

constitutional violations similar to those alleged in the case at bar, and also alleged actions for breach of contract, fraud and deceit. All of the allegations were connected with plaintiff's failure to be admitted to the Kentucky Bar. The District Court dismissed plaintiff's complaint seeking monetary damages on the grounds of absolute judicial immunity or quasi-judicial immunity. The Sixth Circuit Court of Appeals first considered the action against the Chief Justice of the Kentucky Supreme Court and stated:

> The power to determine who should practice before the courts had been aptly summarized by Chief Justice Taney:
>
> "And it has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualifed to become one of its officers, as an attorney and counsellor, and for what case he ought to be removed."
>
> **Ex parte Secombe,** 60 U.S. (19 How.) 9, 13, 15 L.Ed. 565 (1856). This power is not only exclusive; it is inherently judicial. **Simon v. Bellinger,** 643 F.2d 774, 780 (D.C. Cir. 1980). **Accord Louis v. Supreme Court of Nevada,** 490 F. Supp. 1174, 1182 (D.Nev. 1980); **Galahad v. Weinshienk,** 555 F.Supp. 1201, 1204 (D.Colio. 1983). Moreover,

in this case, the Kentucky Constitution charges the Kentucky Supreme Court with the duty to "govern admission to the bar and the discipline of members of the bar." Ky. Const. of 1891, § 116 (1976).

The court's exercise of its inherent power to choose its officers is substantially determinative of the character and quality of our entire judicial system, state and federal. Our system of justice depends, in substantial measure, upon the service of competent and qualified attorneys. The decision whether to admit or deny an applicant admission to the bar, and thus to determine the composition and quality of the bar, affects both the quality of justice in our courts and the public's perception of that quality. The decision is therefore integral to the very essence of the judicial process.

* * *

We hold that the action of considering an application for admission to the bar, particularly when that duty is imposed upon the judiciary by constitution, is a judicial act. When it is performed by a judge, he or she is entitled to absolute judicial immunity. Therefore, the district court was correct in dismissing the plaintiff's complaint against the Chief Justice of Kentucky Supreme Court.

818 F.2d at 543.

The Court then considered the liability of the remaining defendants and noted that these individuals on the committee and the board of bar examiners were performing duties imposed upon them by the Kentucky Supreme

Court and that they act under the direct supervision of the Kentucky Supreme Court. The Court then stated:

> The act of considering an application to the bar is a judicial act. And it is no less a judicial act simply because it is performed by nonjudicial officers in whom the responsibility for the performance of such duties is lawfully delegated by the judiciary. Therefore, those who perform this duty on behalf of the judiciary are entitled to the same judicial immunity as would be enjoyed by judicial officers performing the same acts.

818 F.2d at 544-45.

Sparks filed a petition for writ of certiorari in the United States Supreme Court which was granted. 108 S.Ct. 744 (1988). The judgment below was vacated and the case was remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of the decision of **Forrester v. White**, 108 S.Ct. 538 (1988).

Upon remand, the Sixth Circuit again considered the case on the Supreme Court's mandate, and on reconsideration held that the opinion in **Forrester** "is entirely distinguishable from this case and, therefore, does not require that we change

our previous decision." No. 85-5629, slip op. at 1-2 (6th Cir. Oct. 18, 1988). The court said:

> In **Forrester**, plaintiff brought a 42 U.S.C. § 1983 action against a state court judge, alleging that that she was demoted and later discharged from her position as a probation officer because of her sex, in violation of the Equal protection Clause of the fourteenth amendment. Under Illinois law, the defendant judge had authority to hire and fire such officers at his discretion. The Supreme Court held that the judge was not protected from liability by absolute judicial immunity because it was "clear that Judge White was acting in an administrative capacity when he demoted and discharged Forrester." 98L.Ed 2d at 566.
>
> No 85-5629, slip op. at 8.

The Sixth Circuit commented:

> Thus, the Court in **Forrester** made clear that only "judicial acts" are protected by judicial immunity, and that administrative decisions, although "often crucial to the efficient operation of public institutions," such as the courts, are not protected by absolute immunity. 98L.Ed. 2d at 566. . . .
>
> In **Forrester**, Justice O'Connor explained that the analytical key "in attempting to draw the line" between functions for which judicial immunity attaches and those for which it does not is the determination whether the questioned activities are "truly judicial acts" or "acts that simply happen to have been done by judges." It is the **nature** of the function involved that determines whether an act is "truly"

judicial. (Emphasis in original).

The question then is whether an "administrative" decision to hire or fire a court staff employee, action not essentially "judicial," as in **Forrester,** is the functional equivalent of the action of the justice in a state supreme court and their designees in considering the qualifications of an applicant for admission to the bar as in this case.

A careful examination of the **Forrester** [case]. . . reveals that the nature of the function involved in determining qualifications for admission to the bar on the one hand, and hiring and firing court staff personnel . . . on the other, are essentially different. The former is a judicial act, the latter . . , [is] not.

* * *

Finally, the power to determine eligibility for membership in the bar has historically been reposed exclusively in the courts. Se **Ex parte Secombe, supra; Simons v. Bellinger, supra.** That is not the say that "because a judge acts within the scope of his authority, such . . . decisions are brought within the court's 'jurisdiction' or converted into 'judicial acts' . . . . ." **Forrester,** 98 L.Ed.2d at 567. Some functions performed by courts are so inherently related to the essential functioning of the courts as to be traditionally regarded as judicial acts. Determining the composition of the bar is just such an historic and traditional function. The establishment of criteria for determining the intellectual competence, academic preparedness, and moral fitness of persons who petition the court for the privilege of undertaking the confidential trust of serving the court as one of its professional officers has always been a

function confined to the courts themselves. It has been universally thought that the courts are best equipped to understand the requirements for adequate representation of lay persons before the courts and to identify the qualifications of those who would undertake such representation as the courts' officers. That inherent expertise, and the exercise of the power to apply it in admitting and rejecting candidates to the practice of law, functions rooted in tradition and history, are arguably as fundamental to the sound functioning of the judiciary as is the task of resolving the disputes such officers present.

> We return, then, to the analytical key... in **Forrester** for...[determining] judicial immunity ...: whether the function in question is a "truly judicial act []" or an "act[] that simply happen[s] to have been done by judges." Whatever argument might be made about the inherently "judicial" character of the function of determining the membership of the bar, it is manifest that whether analyzed from the perspective of judicial precedent, judicial expertise, history and tradition, or the nature of the act itself, determining the composition of the bar is clearly not a function, like hiring and firing administrative, clerical, and other court personnel that is or ever had been performed by anyone in the private sector or in other branches of government, and "simply happen[s] to have been done by judges."

No. 85-5629, slip òp. at 9-10, 12-13.

We approve the reasoning of the Court of Appeals for the Sixth Circuit in **Sparks**, and we find the position of the parties in that case not unlike the position of the

parties in the case at bar. We previously noted that our Supreme Court has the inherent and statutory power to regulate the admission to the practice of law. The Board of Law Examiners are appointed by our Supreme Court to hold office at the discretion of the Supreme Court. T.C.A. § 23-1-101 (a) (Supp. 1988). The individual defendants are appointed by the Board under the direction of the Supreme Court to act as the Board directs. Rule 7 § 12.09. Therefore, we hold that these defendants have absolute judicial immunity for the acts complained of, and plaintiffs' suit was properly dismissed.

Furthermore, we note other valid reasons for dismissal of plaintiffs' suit. Section 13.02 of Rule 7, Rules of the Supreme Court, allows aggrieved parties to file a petition for relief with the Board of Law Examiners. A review of the Board's action on the petition is provided by Rule 7, § 14.01 which states:

Petition for Review. - Any person aggrieved by an action by the Board may petition this Court for a review thereof, as under the common law writ of certiorari. On the grant of the writ, the Administrator shall certify and forward to the Court a complete record of the proceedings before the Board in that matter. Any such petition must be filed within 60 days after the action complained of.

In **Petition of Tennessee Bar Ass'n,** 539 S. W. 2d 805 (Tenn. 1976), the Court, speaking through Justice Fones, said:

> The Supreme Court of Tennessee has original and exclusive jurisdiction to promulgate its own Rules. Its rule making authority embraces the admission and supervision of members of the Bar of the State of Tennessee.
>
> . . . No other court in Tennessee has jurisdiction to promulgate a Rule governing the licensing of attorneys, and no other Court in Tennessee has jurisdiction to review and change or void any Rule promulgated by this Court.

539 S.W.2d at 807.

In **Belmont v. Board of Law Examiners,** 511 S.W.2d 461 (Tenn. 1974), the Supreme Court speaking of its rule governing admission to the bar, said:

> . . . [T]his Court has the inherent power to prescribe and administer rule pertaining to the licensing and admission

of attorneys and as a necessary corollary thereto, no other court in Tennessee can construe or determine the applicability of a rule used to implement that power. It results, therefore, if this Court has the inherent and original power to prescribe the rules, then this Court has the original power to review the action of the Board of Law Examiners in interpreting and applying them. (citations omitted).

511 S.W.2d at 462.

From the foregoing we conclude that the trial court had no subject matter jurisdiction of the claims for injunctive or monetary relief against the individual defendants connected with the Board of Law Examiners as they pertain to their actions in the application of the rules and procedures established for determining a passing or failing grade on the bar examination.

Plaintiffs also allege that they were defamed by the actions of these defendants in that the defendants published to the world that plaintiffs had failed the bar examination. However, it is conceded that the defendants did not publish the fact that the plaintiffs failed the examination, but

merely did not include them in the list of those that passed the examination. In fact, plaintiffs did not pass the examination; therefore, there was nothing untrue about the publication. For communications to be libelous, they must constitute a serious threat to plaintiffs' reputations and be factually false. **See Stone River Motors, Inc. v. Mid-South Publishing Co.,** 651 S.W.2d 713 (Tenn. App. 1983). We fail to see how the failure to pass the bar examination is a serious threat to someone's reputation, and conclude that in addition to the other valid defenses this allegation fails to state a claim upon which relief can be granted.

Plaintiffs also allege that the individual defendants were guilty of outrageous conduct causing them severe mental and emotional damage. Viewing the complaint as a whole, we find the allegations in this regard to be general and conclusive and there is absolutely no allegation concerning the conduct of the individual defendants which

cause the damages alleged by plaintiffs. In **Swallows v. Western Electric Co.,** 543 S.W.2d 581 (Tenn. 1976), the Supreme Court said:

> The Tennessee Rules of Civil Procedure, while simplifying and liberalizing pleading, do not relieve the plaintiff in a tort action of the burden of averring facts sufficient to show the existence of a duty owed by the defendant, a breach of the duty, and damages resulting therefrom. The complaint in this action is replete with conclusions couched in the language of **Medlin, supra,** but does not undertake to describe the substance and severity of the conduct of appellee's employees which allegedly amounted to harassment, nor the substance and severity of the conduct of Pinkerton in its investigations, nor the actions of Western Electric in attempting to discipline appellant. And, as was pointed out in **Medlin,** "it is not enough in an action of this kind to allege a legal conclusion; the actionable conduct should be set out in the [complaint]," **supra** 398 S.W.2d at page 275. This is so because the court has the burden of determining, in the first instance, whether appellees' conduct may reasonably be regarded as so extreme and outrageous as to permit recovery or whether the conduct is such as to be classed as "mere insults, indignities, threats, annoyances, petty oppression, or other trivialities," for which appellees would not be liable. **See** comments to § 46 of the **Restatement of Torts, Second.**

543 S.W.2d at 583.

Therefore, under the holding of **Swallows,** clearly plaintiffs do not state a cause of action for outrageous conduct.

Plaintiffs also allege that they were induced to take the examinations by virtue of false representations that there were standards of minimum competency for the passing of the essay questions. There are no allegations with particularity concerning the alleged misrepresentations or any identification of the defendants that made the alleged misrepresentations. These allegations must be made with particularity. Tenn.R.Civ.P. 9. Plaintiffs fail to state a claim upon which relief can be granted.

After a complete review of this record, we are of the opinion that the trial court reached the right result, although in some respects for reasons different from those of this Court. This court will affirm a judgment correct in result, but rendered upon different, incomplete or erroneous grounds. **Hopkins v. Hopkins,** 572 S.W.2d 639 (Tenn. 1978).

Therefore, the order of the trial court dismissing plaintiffs' complaint is affirmed,

and costs of the appeal are assessed against the appellants.

/s/
CRAWFORD, J.

CONCUR:

/s/
HIGHERS, J.

/s/
FARMER, J.

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

LINDA A. HAMPTON AND ROSE O. HOWARD, APPELLANTS	) SHELBY LAW NUMBER 49
VS.	)
TENNESSEE BOARD OF LAW EXAMINERS, JOINTLY AND SEVERALLY, KATHERINE DARDEN, WHEELER ROSENBALM, CHARLES BURSON, VALERIUS SANFORD, LEWIS HAGOOD, JOSEPH TIPTON, MICHAEL WHITAKER, RODNEY V. AHLES, SCOTT MCGINNESS, PRINCE CHAMBLISS, ELLEN VERGOS, OTHER UNKNOWN EXAMINERS, MEMPHIS STATE UNIVERSITY'S CECIL C. HUMPHREY SCHOOL OF LAW, THOMAS CARPENTER, CLAUDE KAUFMAN, FRANCIS SULLIVAN, DANIEL WANAT, ROBERT BANKS, NANCY BARRON, APPELLEES	)

O R D E R

On considering the application for permission to appeal and briefs filed in this case and the entire record, the

application of Linda A. Hampton and Rose O. Howard is denied at cost of the appellants.

PER CURIAM